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In The

Supreme Court of the United States

October Term, 1975

No. 75-1337

BARBARA GUTMACHER GIRARD,

Petitioner,

vs.

94th STREET AND FIFTH AVENUE CORPORATION, LAWRENCE WILKINSON, JOHN H. STOOKEY AND THOMAS E. MURRAY,

Respondents.

BRIEF AND APPENDIX FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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APPENDIX

A — Petitioner's Complaint 1a

In The

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BRIEF AND APPENDIX FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The opinion of Judge Robert J. Ward of the District Court for the Southern District of New York (App. I of Petition) is reported at 396 F. Supp. 450. The affirmance of the Court of Appeals for the Second Circuit by Judge Thomas J. Meskill, in which Judge Sterry R. Waterman joined, and the dissent by Judge James L. Oakes, are not yet reported but are annexed as Appendix II to the petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

1. Do the allegations of the complaint set forth facts sufficient to constitute a conspiracy within the meaning of 42 U.S.C. §1985(3)?

2. Did the acts of respondent 94th Street and Fifth Avenue Corporation (the "Corporation"), a corporation owning a cooperative apartment house in New York City, constitute "state action" so as to raise a claim in petitioner under 42 U.S.C. §1983 merely because the State of New York provided a disinterested forum to resolve a dispute which arose when the Corporation, pursuant to and consistent with the terms of a typical provision in lease agreements relating to co-operative apartments, refused to consent to the transfer of 497 shares of its stock (the "stock") to petitioner?

3. Are petitioner's claims barred by reason of the doctrine of *res judicata*?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent constitutional provisions involved (the Fifth Amendment to the United States Constitution and Sections 1 and 5 of the Fourteenth Amendment to the United States Constitution) and the pertinent sections of the Civil Rights Act of 1871 (42 U.S.C. §§1983 and 1985(3) (1974)) are set forth in the petition at pages 3-4. The pertinent provisions of 28 U.S.C. §1738 (1966) provide:

> "[J]udicial proceedings . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

STATEMENT OF THE CASE

Petitioner commenced this action on February 10, 1975, when the complaint was filed (1A).[1] The complaint alleges that the petitioner resides at, and that the Corporation owns and manages, the cooperative apartment building at 1125 Fifth Avenue in the City of New York (3A-4A; Complaint,[2] ¶¶ 3-5).

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1. References are to pages of the Appendix in the Court of Appeals unless otherwise indicated.

2. A copy of petitioner's complaint is appended hereto as Appendix A.

The individual respondents are alleged to constitute the Corporation's officers and Board of Directors (4A; Complaint, ¶ 6).

According to the complaint, in January of 1968, Stephen Girard, who was then petitioner's husband, (i) purchased 497 shares of the stock; (ii) became the owner of a proprietary lease (the "lease") with respect to the fourth floor apartment in the Corporation's building; and (iii) with petitioner occupied said apartment (4A-5A; Complaint, ¶¶ 7-9). Thereafter, petitioner and Stephen Girard allegedly entered into a separation agreement which, *inter alia*, assigned the stock and the lease to petitioner (5A; Complaint, ¶¶ 11-12).

Petitioner is then alleged to have demanded that the Corporation consent to the transfer of the stock from Stephen Girard to petitioner, but the Corporation allegedly refused without permitting petitioner to appear at Board of Directors' meetings and without providing petitioner with minutes of said meetings (5A, 6A-7A; Complaint, ¶¶ 13-15).

Nowhere does the record indicate that the individual respondents acted outside their capacities as directors (100A; App. I of Petition, p. A11). Nowhere does the record indicate that the refusal by the Corporation to consent to the transfer of the stock from Stephen Girard to petitioner was imbued with any "state action." Nowhere (contrary to petitioner's brief at page 5) does the record indicate that the apartment in issue was petitioner's marital residence. The separation agreement shows instead that petitioner was residing in England when Stephen Girard assigned the stock to her (38A). And, nowhere (contrary

to petitioner's brief at page 5) does the record indicate that the stock was bought by Stephen Girard and petitioner together. The record shows that the stock was purchased by Stephen Girard only (13A-33A, 67A).

The Lease

The refusal to consent to the assignment from Stephen Girard to petitioner could not have come as a surprise to petitioner. The lease agreement entered into between Stephen Girard and the Corporation expressly provided that the Board of Directors of the Corporation, on the Corporation's behalf, had to consent to any such assignment. The lease in relevant part provides:

> "Except as provided in Article IV of this lease [relating to cancellation of the lease], the Lessee shall not assign this lease, or any interest therein, and no such assignment shall take effect as against the Lessor for any purpose, unless and until all of the following requirements have been complied with and satisfied:
>
> * * *
>
> 4. A written consent to such assignment, authorized by a resolution of the Board of Directors, or signed by a majority of the directors . . . must be delivered to the Lessor." (21A).

Such a provision is typical with respect to cooperative apartment leases in New York City and is enforceable under New York law (80A).

The Decision of the District Court

By notice of motion dated March 18, 1975, respondents moved to dismiss the complaint on the ground that it failed to state a claim upon which relief could be granted or, in the alternative, for summary judgment (56A). Affidavits and exhibits were submitted to the District Court by both sides and the court treated the motion as one for summary judgment (90A).

The District Court granted summary judgment to respondents:

(1) dismissing petitioner's §1983 claim for failure to allege facts sufficient to support a finding of "state action" (94A-98A; App. I of Petition, pp. A6-9);

(2) dismisisng petitioner's claim for relief under §1985(3) because, even if the facts alleged were true, petitioner failed to allege facts sufficient to constitute a conspiracy within the meaning of §1985(3) (98A-100A; App. I of Petition, pp. A10-11); and

(3) dismissing petitioner's pendent state claim (101A; App. I of Petition, pp. A11-12).

The District Court did not consider the additional argument raised by respondents that petitioner's claims were barred by the doctrine of *res judicata* (101A-102A; App. I of Petition, p. A12).

Petitioner then appealed to the United States Court of Appeals which affirmed the order of the District Court.

The Prior State Court Actions

Prior to the institution of this case, an action ("Action No. 1") entitled, "Barbara Girard, plaintiff, against 94th Street and Fifth Avenue Corporation, defendant," Index No. 15173/73, was brought by petitioner in the Supreme Court of the State of New York, New York County, on the same cause of action and relating to the same apartment as the instant action (61A-66A). Petitioner there, as here, recited the transfer of the stock and lease from Stephen Girard to petitioner and her request to the Corporation that it consent to said transfer (65A). Petitioner also, in Action No. 1, sought a declaration that the Corporation's refusal to consent was "arbitrary, capricious and unreasonable" (65A-66A).

Also prior to the institution of this case, but after the Corporation had terminated the lease by notice as provided for in the lease (25A-26A) on account of the improper assignment of the stock, an action ("Action No. 2") was commenced by the Corporation against Stephen Girard and against petitioner herein in Civil Court, County of New York (109A). Action No. 2 was a holdover proceeding for possession of the apartment (68A-80A).

The Corporation moved for summary judgment in Action No. 1. The motion was granted (75A, 78A-80A). The court held that the Corporation had the right and power to reject petitioner's demand to transfer the stock and to refuse to consent to the assignment of the lease, and that such refusal was authorized by and consistent with the terms of the lease (78A-80A).

The Appellate Division, First Department, affirmed the order and judgment made by the New York Supreme Court, New York County (60A).

Petitioner's motion for leave to appeal to the Court of Appeals was denied on January 9, 1975 (60A).

One month later, petitioner commenced this action (1A).

ARGUMENT

The issues involved in this case are narrow, and no amount of hyperbole can convert this case into one warranting review by this Court on certiorari. We are here only concerned with whether the allegations of petitioner's complaint allege facts sufficient to constitute a conspiracy within the meaning of §1985(3), a necessary element of a claim under that section, and with whether the State of New York merely by providing an impartial forum for the litigation of complaints, can convert purely private acts into those of the state so as to subject litigants to suits under §1983. Both the District Court and the Court of Appeals answered both questions in the negative.

The particular allegations of the complaint only allege that the Corporation, through its Board of Directors (the individual respondents), refused to consent to the transfer of the stock to the petitioner. Nowhere is it alleged that the directors were acting in other than their capacities as directors. And just as a private individual cannot conspire with himself, a corporation cannot conspire with itself.

Nor can it be said that any time state courts afford a disinterested forum for the resolution of purely private disputes, the actions which are the subject of the disputes become imbued with "state action" so as to raise a claim in one of the disputants under §1983. As the Court of Appeals said below, quoting from its prior decision in *McGuane v. Chenango Court Inc.*, 431 F.2d 1189, 1190 (1970), *cert. denied*, 401 U.S. 994 (1971):

> "'[N]either despite some language in *Shelley v. Kraemer* can state action be found in New York providing defendant with the same right to secure the eviction of a tenant by a proceeding in its courts that it gives to all landlords; the one thing now almost universally agreed is that such a rationale for that landmark decision would be altogether too far-reaching.'" (App. II of Petition, p. A19).

Accordingly, on this particular complaint and on these particular facts, the decision of the District Court and the affirmance of the Court of Appeals were manifestly correct. There is no important question of federal law requiring decision by this Court.

I.

THE DECISION BELOW IS CLEARLY CORRECT.

A. There Can Be No Conspiracy By A Single Entity.

For relief to be granted under §1985(3), a plaintiff must plead and prove that the defendants conspired or went in

disguise on the highway or on the premises of another.[3] *Griffin v. Breckinridge*, 403 U.S. 88, 102-103 (1971). Since there is nothing in the complaint or the record about a "disguise," petitioner must plead and prove the existence of a conspiracy.

When the Corporation refused to consent to the transfer of stock from Stephen Girard to petitioner, it was acting pursuant to the provisions of the lease. The lease stipulates that consent is required before an assignment can take effect. Understandably, the Corporation's decision on petitioner's request was formulated and carried out by the members of its Board of Directors, the individual respondents herein. No allegation is made that these directors were acting outside of their official capacities in refusing the requested transfer.

Accordingly, none of the respondents were, or could have been, part of a conspiracy.

> "A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation." *Nelson Radio & Supply Co. v. Motorola*, 200 F.2d 911, 914 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953).

These precepts have been applied in factual circumstances very close to those involved here. In *Dombrowski v. Dowling*,

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3. The opening phrase of the statutory provision states: "If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another. . . ."

459 F.2d 190 (7th Cir. 1972), the plaintiff, an attorney, alleged that the corporate manager of a building and two of the manager's employees, in violation of §1985(3), conspired to and did refuse to rent the plaintiff space because a substantial number of his clients were black. In holding that judgment for the plaintiff could not be grounded on §1985(3), then Circuit Judge Stevens wrote for the court as follows:

> "[T]he statutory requirement that 'two or more persons . . . conspire or go in disguise on the highway,' is not satisfied by proof that a discriminatory business decision reflects collective judgment of two or more executives of the same firm."

Dombrowski has been accorded substantial, if not decisive, weight on similar conspiracy issues by many courts, including the District Court and the Court of Appeals below (App. I of Petition, pp. A10-11; App. II of Petition, pp. A21-23). See, *e.g.*, *Baker v. Stuart Broadcasting Company*, 505 F.2d 181, 183 (8th Cir. 1974); *Cole v. University of Hartford*, 391 F. Supp. 888 (D. Conn. 1975); and *Fallis v. Dunbar*, 386 F. Supp. 1117 (N.D. Ohio, 1974).

In the *Fallis* case, the plaintiffs, former tenants of the corporate defendants, alleged that the renewal of their lease was denied by the corporate defendants and their employees (who were also named as defendants), and that said defendants sought to evict them, all for organizing and being active in a tenants' association.

Although there was some question about whether plaintiffs had abandoned their §1985(3) claim, the court ruled as follows in granting defendants' motion to dismiss:

> "Given the fact that only Dunbar Real Estate Co. and its officers, employees and agents were involved in the actions complained of, the Court finds that there were not 'two or more persons' who conspired to deprive plaintiffs of any civil rights. A corporation exists as a person only in a legal sense; it can act and speak only through its officers, employees, and agents. The action of Roger Dunbar in deciding to evict plaintiffs and the actions of other employees and agents in carrying out that decision were within the scope of their employment by Dunbar Real Estate Co. As such, the conspiracy requirement of §1985(3) has not been met." 386 F. Supp. at 1121.

Petitioner also points to the supposed malicious telephone calls she received which she claims were made by the individual respondents. But again, petitioner does not assert that the individual respondents were acting other than as officers and directors. As the Court of Appeals below said (App. II of Petition, A24):

> "[T]he complaint identifies them [the individual respondents] only by their corporate status. The fact that they were also shareholders and tenants of apartments in the defendant-corporation's building does not aid plaintiff's case, since she

> did not allege that the individual defendants were motivated by any independent personal stake in achieving the corporation's objective. In *Cole v. University of Hartford*, 391 F. Supp. 888, 893 (D. Conn., 1975) the court stated that
>
> > '[s]imply joining corporate officers as defendants in their individual capacities is not enough to make them persons separate from the corporation in legal contemplation. The plaintiff must also allege that they acted other than in the normal course of their corporate duties. . . . "[I]t is not alleged that the individual defendants committed any act of a personal nature except in connection with the corporate affairs."'"

Accordingly, the Court of Appeals properly affirmed the District Court's dismissal of petitioner's §1985(3) claim for failure to state an actionable conspiracy under the statute.

B. Respondents Committed No Acts "Under Color Of" Law

For petitioner to establish her entitlement to relief under §1983, she must show that respondents acted "under color of" law to deprive her of a constitutionally secured right.[4] *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150 (1970). In cases under §1983, "under color of" law has consistently been treated as the

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4. The beginning phrase of §1983 provides: "Every person who, under color of any statute, ordinance, custom or usage of any State or Territory. . . ."

same thing as the "state action" required under the Fourteenth Amendment. *United States v. Price*, 383 U.S. 787, 794 n. 7 (1966) (citing cases).

But, the Corporation in refusing to consent to said transfer was merely exercising its rights under a clause in the lease, which clause the New York Supreme Court found to be enforceable (80A). In these circumstances, petitioner's claim that respondents violated §1983 is without substance. There was no "state action." As was said in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1972):

> "The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever. Since state-furnished services include such necessities of life as electricity, water, and police and fire protection, such a holding would utterly emasculate the distinction between private as distinguished from state conduct set forth in *The Civil Rights Case, supra*, and adhered to in subsequent decisions. Our holdings indicate that where the impetus for the discrimination is private, the State must have 'significantly involved itself with invidious discriminations,' *Reitman v. Mulkey*, 387 U.S. 369, 380 (1967), in order for the discriminatory action to fall within the ambit of the constitutional prohibition."

It is evident in the instant case that not only has there been no "significant involvement" by the state in the activities of respondents, but there has been no state involvement at all.

Petitioner's position on her §1983 claim appears to be that because the Corporation, by summary proceeding in the state courts, sought to evict petitioner and to terminate the lease, the Corporation's acts in denying the transfer of the stock was somehow infused with "state action." The long and short of petitioner's position is that any time reference is made to a state-provided forum for resolution of a dispute, however private, sufficient "state action" is present to support a §1983 claim. Petitioner cites only one case in support of this position — *Shelley v. Kraemer*, 334 U.S. 1 (1948).

Petitioner's argument has been soundly refuted not only in this case but in other cases.

> "Citing Shelley v. Kraemer, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948), [plaintiff] argues that the requisite state action is present because Pennsylvania has provided a forum for the . . . lawsuit, . . . While Shelley v. Kraemer does establish that the action of state courts may constitute state action for purposes of the Fourteenth Amendment and thus may give rise to a claim under the Civil Rights Act of 1871, the state judicial action involved in *Shelley* is readily distinguishable from that presented here. In *Shelley* the state courts, following a settled line of

state decisions, had enforced racially restrictive covenants in deeds. The state had thus provided 'the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners [were] willing and financially able to acquire and which the grantors [were] willing to sell. The difference between judicial enforcement and nonenforcement of the restrictive covenants [was] the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing.' 334 U.S. at 19, 68 S. Ct. at 845.

. . . Thus far Pennsylvania has merely provided a forum to determine the rights of the parties. Both logic and precedent suggest that merely by holding its courts open to litigation of complaints, regardless of how baseless they eventually prove to be, Pennsylvania does not clothe persons who use its judicial processes with the authority of the state in the sense that [plaintiff] suggests." *Stevens v. Frick*, 372 F.2d 378, 381 (2d Cir. 1967), *cert. denied*, 387 U.S. 920 (1967).

Accordingly, as a general principle, the filing of a suit by a private party is not "state action." More specifically, courts have consistently held that the institution of an eviction suit by a

landlord does not constitute "state action." *McGuane v. Chenango Court, Inc.*, 431 F.2d 1189, 1190 (2d Cir. 1970), *cert. denied*, 401 U.S. 994 (1971); *Weigand v. Afton View Apartments*, 473 F.2d 545, 548 (8th Cir. 1973); *Mullarkey v. Borglum*, 323 F. Supp. 1218, 1225-1227 (S.D.N.Y. 1970); *Fallis v. Dunbar*, *supra*, 386 F. Supp. at 1120-1121.

In *McGuane*, a case having facts very similar to those here, and a case where this Court denied certiorari, the plaintiff, complaining that her landlord refused to renew her lease, brought an action under §1983 alleging violation of her civil rights. The Court dismissed the plaintiff's §1983 claim, saying at page 1190:

> "Neither, despite some language in Shelley v. Kraemer, 334 U.S. 1, 13, 68 S. Ct. 836, 92 L. Ed. 1161 (1948), can state action be found in New York providing defendant with the same right to secure the eviction of a tenant by a proceeding in its courts that it gives to all landlords; the one thing now almost universally agreed is that such a rationale for that landmark decision would be altogether too far-reaching."

Accordingly, plaintiff's claim under §1983 fails because of the absence of the requisite "state action."

II.

THERE IS NO CONFLICT AMONG THE CIRCUITS.

Petitioner asserts that this Court should review the decision of the court below because there is a conflict among the Circuits regarding the interpretation of the conspiracy requirement of §1985(3). Petitioner, however, is seriously mistaken. She points to decisions in four Circuits: the Eighth, Sixth, Fifth and Third.

First, the Eighth Circuit is fully in accord with the holding of the Court of Appeals below. In *Baker v. Stuart Broadcasting Company,* 505 F.2d 181 (8th Cir. 1974), the plaintiff, a prospective employee of the defendant, claimed that the defendant and some of its officers conspired to deny her employment on account of her race. In dismissing the complaint, the court, at page 183 and relying on then Circuit Judge Stevens' decision in *Dombrowski,* ruled as follows:

> "In dealing with this precise issue of an alleged conspiracy in a business situation, the Seventh Circuit Court of Appeals in Dombrowski v. Dowling, 459 F.2d 190, 196 (7th Cir. 1972), observed:
>
> 'We . . . believe that the statutory requirement that "two or more persons . . . conspire or go in disguise on the highway," is not satisfied by proof that a discriminatory business decision reflects the collective judgment of two or more executives of

> the same firm . . . [I]f the challenged conduct is essentially a single act of discrimination by a single business entity, the fact that two or more agents participated in the decision or in the act itself will normally not constitute the conspiracy contemplated by this statute.'
>
> The record shows that Ms. Baker's complaint is directed at a radio broadcasting company which, through its personnel or owners, declined to employ her. The petitioner does not allege the necessary elements of conspiracy required to maintain a cause of action pursuant to 42 U.S.C. §1985(3)."

The *Baker* case was decided three years after *Action v. Gannon,* 450 F.2d 1227 (8th Cir. 1971), the Eighth Circuit case petitioner claims is at variance with the decision below.

Second, the Sixth Circuit case cited by petitioner, *Cameron v. Brock,* 473 F.2d 608 (6th Cir. 1973), has nothing to do with conspiracies by corporations and their officers or directors. And, in any event, the *Fallis* case, discussed at length above, is a case decided in the Sixth Circuit subsequent to the decision in *Cameron* and is in full accord with the decision below.

Third, the Fifth Circuit's opinion in *Westberry v. Gilman Paper Co.,* 507 F.2d 206, 216 (1975), was withdrawn, the judgment of the court was vacated, and the cause was

"remanded to the district court with directions to dismiss as moot, *so that it will spawn no legal precedents.*" (Emphasis added.) *McLellan v. Mississippi Power & Light,* No. 73-3266 (5th Cir. Feb. 5, 1976) is also not in point. There a conspiracy was alleged by a discharged employee against his employer, his union, and a local of his union.

Fourth, the Third Circuit case to which petitioner refers, *Richardson v. Miller,* 446 F.2d 1247 (1971), contains no discussion whatever on the conspiracy point.

Finally, other cases cited by petitioner, including *Rackin v. University of Pennsylvania,* 386 F. Supp. 992 (E.D. Pa. 1974), and *Pendrell v. Chatham College,* 370 F. Supp. 494 and 386 F. Supp. 341 (W. D. Pa. 1974), are equally unavailing. We refer the Court to the Court of Appeals' discussion of those authorities (App. II of Petition, pp. A22-23).

III.

PETITIONER'S CLAIMS IN THIS ACTION ARE BARRED BY THE DOCTRINE OF *RES JUDICATA.*

Because summary judgment was entered below dismissing the complaint on the grounds described above, and because the Court of Appeals affirmed the order of the District Court, respondents' assertions that petitioner's claims were barred by the doctrine of *res judicata* were not considered below.[5]

5. In dissent in the Court of Appeals Judge Oakes did indicate, in a footnote, that he thought the suit was not "barred by the *res judicata* effect."

Respondents contend, however, that the doctrine of *res judicata* provides yet another independent basis for the judgment of dismissal entered below.

Petitioner could have come directly to the federal courts and asserted what she contends is the Corporation's wrongful refusal to consent to the transfer of the stock. Instead, petitioner chose a state forum for judicial review. She began Action No. 1 in August of 1973 and it was concluded on January 9, 1975, when leave to appeal the Appellate Division's affirmance of the New York Supreme Court's order and summary judgment in the Corporation's favor was denied. Thereafter she commenced this action.

In her state court action, petitioner alleged that:

> "The rejection by defendant corporation to transfer the aforesaid stock is an *arbitrary, capricious and unreasonable* determination that will prejudice plaintiff . . ." (63A). (Emphasis added.)

Also petitioner sought a declaration from the court that the Corporation's refusal to consent to the transfer of the stock was "arbitrary, capricious and unreasonable" (65A).

Having chosen the state forum, petitioner should have raised all relevant issues available to her in the state action, including the claimed violations of §§1983 and 1985(3). State courts are competent to adjudicate questions of federal

constitutional rights. *NAACP v. Button,* 371 U.S. 415, 427-428 (1963); *Grubb v. Public Utilities Commission of Ohio,* 281 U.S. 470, 476 (1930); *Doherty v. Meisser,* 66 Misc. 2d 550, 555 (N.Y. Sup. Ct., Nassau Co., 1971).

The judgment entered in Action No. 1 specifically provided:

> "3. That defendant corporation has the right or power to refuse to consent to the assignment of the proprietary lease from Stephen S. Girard to Barbara Girard of the fourth floor Apartment at 1125 Fifth Avenue, New York, New York 10028; and
>
> 4. That the defendant corporation's refusal to transfer the stock of defendant corporation from Stephen S. Girard to Barbara Girard and to consent to the assignment of the proprietary lease to the apartment located on the fourth floor of 1125 Fifth Avenue, New York New York, was authorized by and consistent with the terms of said proprietary lease; . . ." (76A).

Well established principles of the doctrine of *res judicata* provide that said judgment is a bar to a subsequent action between plaintiff and the Corporation involving the same cause of action. The relief petitioner seeks in this action is just what the quoted provision of the state court judgment says she cannot have. The rule was put forth succinctly in *Saylor v. Lindsley,* 391 F.2d 965, 968 (2d Cir. 1968):

> "The general rule of *res judicata* is that a valid, final judgment, rendered on the merits, constitutes an absolute bar to a subsequent action between the same parties, or those in privity with them, upon the same claim or demand. It operates to bind the parties both as to issues actually litigated and determined in the first suit, and as to those grounds or issues which *might have been,* but were not, actually raised and decided in that action. The first judgment, when final and on the merits, thus puts an end to the whole cause of action." (Emphasis added.)

Of particular significance to these facts is 28 U.S.C. §1738, which provides, in pertinent part:

> "[J]udicial proceedings . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

Clearly, petitioner could not relitigate Action No. 1 in the New York State courts even if she asserted claims under §§1983 and 1985(3). Weinstein-Korn-Miller, New York Civil Practice, par. 5011.17 at p. 50-103 and cases cited therein. She has already had her day in court, and lost. Accordingly, by reason of the above-quoted statutory provision, this same result must obtain in the federal courts.

Also in point is *Lovely v. Laliberte,* 498 F.2d 1261 (1st Cir. 1974), *cert. denied,* 419 U.S. 1038 (1974). There, the plaintiff asserted a §1983 claim against his landlord alleging that he was evicted from his mobile home park on account of his protests over the conditions at the park. The plaintiff did not raise his §1983 claim based on his First Amendment rights in the state court action brought successfully by his landlord, but asserted it in the subsequent federal action.

In holding that the plaintiff's §1983 claim was barred by the prior state court judgment, the court, at page 1263, said:

> "Res judicata precludes even 'perfect defenses . . . of which no proof was offered. . . . [A] judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, . . .' Cromwell v. County of Sac, 94 U.S. 351, 352-353, 24 L. Ed. 195 (1877). *In Preiser v. Rodriguez, 411 U.S. 475, 497, 93 S. Ct. 1827, 36 L. Ed. 2d 439 (1973), the Supreme Court indicated that res judicata would be fully applicable to §1983 actions."* (Emphasis added.)

Accord: Frazier v. East Baton Rouge Parish School Board, 363 F.2d 861 (5th Cir. 1966).

In dissent in the Court of Appeals below, Judge Oakes, in a footnote (App. II of Petition, p. A32, n.6), indicated that he thought the present action was not barred by the doctrine of *res judicata* citing *Herendeen v. Champion Int'l Corp.,* 525 F.2d 130 (2d Cir. 1975). Judge Oakes, however, did not, and did not purport to, give full consideration to this issue in dissent. The *Herendeen* case involved a former employee of a subsidiary of the defendant who quit his job but relied on an alleged oral understanding that he would continue to receive all employment benefits and a written contract from his former employer. He brought suit on the alleged oral understanding in the New York State Court and lost on the ground that enforcement of the oral agreement was barred by the Statute of Frauds and because the oral statements were merely an agreement to agree. In the federal court, the plaintiff then started a new action for his pension rights that he claimed were vested under his former contract of employment. The Court of Appeals held that the judgment in the state action did not bar the federal action because two distinct causes of action were involved based on two distinct contracts.

The instant situation is different. Here if petitioner were to prevail on her claims she would obtain just what the New York Supreme Court said she could not have — the right to cause the Corporation to transfer the stock to her.

As this Court said in *Pittsburgh & West Virginia Railway v. United States,* 281 U.S. 470, 479-80 (1930):

> "The thing presented for adjudication in the case in the state court was the validity of the order and it was incumbent on the appellant to present in support of his asserted right of attack every

available ground of which he had knowledge. He was not at liberty to prosecute that right by piecemeal, as by presenting a part only of the available grounds and reserving others for another suit, if failing in that.

As the ground just described was available but not put forward the appellant must abide by the rule that a judgment upon the merits in one suit is *res judicata* in another where the parties and subject matter are the same, not only as respects matters actually presented to sustain or defeat the right asserted, but also as respects any other available matter which might have been presented to that end." (Citations omitted.)

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A — PETITIONER'S COMPLAINT

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BARBARA GIRARD,

Plaintiff,

-against-

94th STREET AND FIFTH AVENUE CORPORATION, LAWRENCE WILKINSON, JOHN H. STOOKEY and THOMAS E. MURRAY,

Defendants.

75 Civ. 646

Plaintiff, BARBARA GIRARD, by her attorneys, BALLON, STOLL & ITZLER, complaining of defendants, respectfully alleges as follows:

JURISDICTION

1. This Court has jurisdiction under 28 U.S.C. §1343 (1), (3), (4) and 28 U.S.C. §1331 (a).

2. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00.

Appendix A — Petitioner's Complaint

AS AND FOR A FIRST CAUSE OF ACTION AGAINST ALL DEFENDANTS

3. Plaintiff resides at 1125 Fifth Avenue, County, City and State of New York.

4. Upon information and belief, defendant, 94TH STREET AND FIFTH AVENUE CORPORATION, is a domestic corporation, duly organized and existing under and pursuant to the laws of the State of New York, and is engaged in business as a cooperative apartment house in the City, County and State of New York.

5. That upon information and belief, the corporate defendant, owns, operates, manages and controls the land and building at premises located at 1125 Fifth Avenue, County, City and State of New York.

6. Upon information and belief, defendants, LAWRENCE WILKINSON, JOHN H. STOOKEY and THOMAS E. MURRAY, are residents of the County, City and State of New York, and constitute the officers and the entire Board of Directors of the corporate defendant, and wholly dominate, operate and control all of its business and financial affairs.

7. Prior to the 10th day of January, 1968, and for some time thereafter up to the 16th day of October, 1973, plaintiff was married to STEPHEN S. GIRARD.

Appendix A — Petitioner's Complaint

8. On or about the 10th day of January, 1968, STEPHEN S. GIRARD purchased 497 shares of capital stock of the corporate defendant, and by reason of said purchase became the owner of the proprietary lease to the 4th floor of the aforesaid premises for the term January 15, 1968 to May 31, 1981. A copy of said lease is annexed hereto and made a part hereof as Exhibit "A".

9. Thereafter, and in accordance with the proprietary lease, and by reason of STEPHEN S. GIRARD'S ownership of the shares of stock of the corporate defendant, the plaintiff, her husband, and the infant child of their marriage, duly entered upon and occupied the 4th floor apartment at 1125 Fifth Avenue, New York, New York.

10. Thereafter, and at diverse times, the corporate defendant accepted maintenance payments from BARBARA GIRARD.

11. On or about the 3rd day of May, 1973, BARBARA GIRARD and her husband entered into a separation agreement pursuant to which, *inter alia,* STEPHEN S. GIRARD duly conveyed and assigned to the plaintiff all of his right, title and interest in and to the aforesaid shares of capital stock and proprietary lease, in lieu of all payments of alimony, gave to the plaintiff sole custody of their infant child and vacated the premises. A copy of said separation agreement is annexed hereto and made a part hereof as Exhibit "B".

Appendix A — Petitioner's Complaint

12. Thereafter, and on or about the 16th day of October, 1973, a judgment of divorce was entered in New York County, which judgment incorporated the aforesaid separation agreement. A copy of said judgment of divorce is annexed hereto and made a part hereof as Exhibit "C".

13. Upon completion of the aforesaid lease-stock transfer, the corporate defendant was duly notified of same, and plaintiff made demand upon the corporate defendant that it duly recognize plaintiff as the owner of said stock, proprietary lease, and the lawful tenant entitled to peaceful possession thereof; and that defendant record on its books and records, plaintiff's ownership of said shares of stock and proprietary lease.

14. Thereafter, and upon receipt of plaintiff's demand as hereinabove alleged, the defendants conspired with each other and formed a deliberate design in purpose to injure this plaintiff solely for the reason that she is of the female sex, and to deprive her of her civil rights by reason of her sex and of her substantial property rights in the subject premises, and, in particular, the ownership of the aforesaid shares of stock and the proprietary lease in said premises, the purpose, intent and result of which was to enable, permit and allow the said defendants to receive for their own use and benefit and not for the benefit of plaintiff the sole and exclusive right to determine who shall own said shares of stock and the proprietary lease in the subject premises, and the said defendants did the various wrongful and unlawful acts hereinafter alleged, all in furtherance of such unlawful design and purpose.

Appendix A — Petitioner's Complaint

15. As a result thereof, the defendants have continually and without cause denied and withheld their consent to the aforesaid lease-stock transfer to plaintiff and have wholly failed and refused, and continue to fail and refuse, to permit her record ownership of said stock, proprietary lease and peaceful possession of the subject premises solely by reason of her sex as hereinabove alleged.

16. In furtherance of the said design and conspiracy as hereinabove alleged, and for the purpose of causing plaintiff to lose her substantial property rights in the subject premises, the said defendants between July 1973 and February, 1975:

(a) Advised, caused, permitted and allowed the President and the Board of Directors of the corporate defendant to deny plaintiff permission and authority to continue occupancy of the subject premises.

(b) Informed plaintiff that the corporate defendant could not and would not accept plaintiff as the true and lawful owner of the aforesaid shares of stock and the proprietary lease in the subject premises even though she had received said property rights by reason of a lawful assignment from STEPHEN S. GIRARD, as hereinabove stated; and specifically refused plaintiff an opportunity to appear and be present at any discussions or meetings of the officers and Board of Directors of the corporate defendant at which she could establish her proprietary interest in said shares of stock and lease, and refused to provide plaintiff with minutes of said meetings or with any statement, written or oral, which would explain the basis of the aforesaid acts.

(c) Failed and refused to accept any checks or other payments tendered by plaintiff or her agents in full payment of the maintenance required for occupancy of said demised premises, although plaintiff duly offered to pay same and has, in fact, tendered to the corporate defendant any and all payments required under the terms of the aforesaid proprietary lease, which payments were previously accepted by the corporate defendant from STEPHEN S. GIRARD and/or plaintiff.

(d) Failed and refused to accept any guarantee by any persons financially able to discharge any indebtedness that may arise to the corporate defendant by reason of plaintiff's continued occupancy of the subject premises as tenant thereof.

(e) Harrassed, annoyed and disturbed plaintiff in her occupancy of the subject premises by commencing legal proceedings for her eviction, and otherwise interfering with her peaceful enjoyment and occupation thereof.

(f) Deliberately and maliciously made telephone calls to plaintiff at unreasonable hours solely for the purpose of harrassing and annoying her in order to force plaintiff to vacate said premises and to withdraw her demand to the corporate defendant to recognize her as the lawful owner of the aforesaid shares of stock and proprietary lease to said premises.

17. The defendants did all of the acts and things hereinabove alleged in pursuance of the aforesaid conspiracy and scheme to cause plaintiff to be deprived of her substantial property rights in the subject premises as hereinabove alleged,

and all of said acts and things were participated in and done by all of the defendants, or by one or more of them as steps in the said conspiracy.

18. All of the aforesaid acts, statements and conduct of the defendants aforesaid, were committed solely for the purpose of excluding plaintiff from occupancy of the premises or right to ownership of the aforesaid shares of stock in the corporate defendant; and solely for the reason that said plaintiff is of the female sex and for no other cause or reason.

19. By virtue of the acts, statements and conduct of the defendants aforesaid, plaintiff was deprived of her civil rights and substantial property rights in the subject premises.

20. The aforesaid acts, statements and conduct of the defendants constitute violations of plaintiff's statutory and constitutional rights, to wit, 42 U.S.C. §1985 (3), 42 U.S.C. §1983, Amendment 14 of the United States Constitution, and the New York Executive Law §296 (5) (a) (1).

AS AND FOR A SECOND CAUSE OF ACTION AGAINST ALL DEFENDANTS

21. Plaintiff repeats and realleges each and every allegation contained in Paragraphs 1 through 20 with the same force and effect as if more fully set forth at length herein.

22. By reason of the foregoing, and, in particular, defendants' wilful and deliberate failure and refusal to give plaintiff an opportunity to be heard with respect to her right to

be recognized and accepted as the lawful owner of the shares of stock and proprietary lease in the subject premises and defendants' arbitrary, capricious and unreasonable failure to so recognize plaintiff as a lawful tenant entitled to peaceful possession and occupancy of said premises as hereinabove alleged, defendants have deprived plaintiff of her constitutional rights of due process of law as provided for by the Constitution of the United States, the Constitution of the State of New York, and applicable federal statutes.

WHEREFORE, plaintiff demands judgment against all defendants, directing that the corporate defendant recognize plaintiff as the lawful owner of the aforesaid shares of stock and proprietary lease in the subject premises, and that the books and records of the corporate defendant adequately and properly reflect her ownership, interest and lawful right to occupation of said premises and that all defendants, their agents, servants and/or employees be enjoined pendente lite and permanently from taking any and all acts constituting a wrongful interference with plaintiff's peaceful enjoyment and possession of said demised premises, and granting to plaintiff such other and further different relief as to the Court may seem just and proper.

DATED: NEW YORK, N.Y.
February 7, 1975

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s/ (illegible)
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